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8 UNITED STATES DISTRICT COURT

9 DISTRICT OF NEVADA

10 * * *

11 UNITED STATES OF AMERICA,

12 Plaintiff,

13 vs.

14 THOMAS A. CECRLE, *et.al.*,

15 Defendants.
16

2:12-cr-400-JAD-GWF

SENTENCING MEMORANDUM OF
DEFENDANT THOMAS CECRLE

17 Certification: This Memorandum is *not* being timely filed, but is being filed two days
18 beyond the normal due date. Counsel for the government has been informed of the possible
delay.

19 I.

20 Position Statement.

21 Some time ago, on an occasion wherein this Court was considering conditions of release for
22 one or more of the defendants, permission was given for the defendants to freely communicate with
23 each other. The government expressed no objection at the time. The defendants in this case, having
24 been friends for years have appreciated, and not abused, the Court's indulgence in this regard.
25 Before beginning to advocate for Mr. Cecrle's sentence, and so as not to overlook what might seem
26 a minor consideration, it is respectfully requested that any final order of this court as to conditions
27 of supervision, continue to permit Mr. Cecrle to have normal social contact with other of the co-

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1 defendants in the case. (This would of course only apply to persons formerly named as
2 codefendants, and not any witnesses or victims in the case.)

3 The Presentence Investigation Report in this case (hereinafter, “the PSR”), recommends a
4 custodial term of 121 months for Mr. Cecrle. This is, as pointed out in the PSR and by the
5 government in its sentencing memorandum, due primarily to the application of two additional points
6 for a greater number of victims and a lack of consideration for the fact that all defendants entered
7 plea agreements. (PSR, p. 11, at 43-52). The Parties’ agreement recommends a sentence of no more
8 than 78 months, and Mr. Cecrle may ask for less. The factors recommended both in the Parties
9 calculation, and by the PSR, are entitled to more deference than any this Court may find to be
10 applicable, and which may be a more accurate reflection of his case.

11 II.

12 Mr. Cecrle is no “mastermind”.

13 While it may give comfort to some, (and serve as a basis to argue about lesser degrees of guilt
14 for others), to opine that Mr. Cecrle masterminded losses of \$2.8 million, those claims, in light of
15 the facts of the case, seem laughable. A mere passing familiarity with the facts of this sprawling case
16 will show the truth of that statement. Consider for example, the restitution amount of \$2.8 million
17 over the 10 years that the conspiracy supposedly existed. That works out, of course, to an average
18 of about \$287 thousand for each of those ten years. According to the available casino records, Mr.
19 Cecrle lost about \$1 million during part of that time gambling. If you consider Cecrle’s own,
20 unreliable, estimate (PSR p. 22, at 94), he would gamble about \$120 thousand away each year. This
21 does not take into account the fortune that he must have wasted on his methamphetamine addiction.
22 (PSR, p. 22 at 96). This doesn’t fit the mastermind mold.

23 What emerges from a closer examination of the facts, is a picture of a group of amateur
24 hucksters held together by laziness, self-deception, ignorance and greed. Consider the very premise
25 that started it all. Cecrle made a claim that he spoke to a former state senator that told him about the
26 vast potential available in wrapping up water rights. Cecrle never showed anything purporting to
27 represent a legal claim on those rights. The whole thing seems most like a variation on the, nearly
28 ancient, offering to sell the Brooklyn Bridge to the country rube.

1 Every claim made, whether water, World War I bonds, or real estate was equally without a
2 hint of substance, each promise consisted, for the most part, on the verbal assurances of Cecrle
3 repeated and embellished through the mouths of Connie Fenton and other co-defendants, and fellow
4 travelers. They couldn't even be bothered to employ the standard grifter's device of a "show."
5 Should Cecrle be forgiven because it is hard to believe that people gave him money? The answer
6 to that rhetorical question is obviously no. All victims are vulnerable to some extent, but to be
7 successful, every con exploits characteristics of human nature, like dishonesty, vanity, compassion,
8 naivete and greed. As the urban dictionary says, "The first rule of gifting is, you can't cheat an
9 honest man."

10 This is not said to say that Cecrle, or more properly his lawyer, is "blaming the victim." But
11 in this case, perhaps more than any other case of fraud his lawyer has ever seen, there exists so little
12 to separate the true believers who were defendants and the ones who were ultimately labeled victims.
13 Neither group seemed capable of controlling their willingness to invest in something that sounded
14 too good to be true.

15 Jeanne Winkler is perhaps not the best example of one of Cecrle's victims, because most
16 others only chased after their bad investments with their own money. Beginning in 2006, Ms.
17 Winkler, an attorney representing Mr. Cecrle at times, dabbled in the promise of this scheme by
18 injecting small amounts of money. (We now know that some of that money was used by Mr. Cecrle
19 to pay his child support.) At the same time, Ms. Winkler began to put over \$200 thousand into her
20 husband's construction business. When that needed more money as the economy tanked, she raided
21 her clients' trust account. At that point, she willingly suspended her remaining skepticism and
22 began to pour money into the "Cecrle dream" of fantastic returns on investment. (*See*: Doc. 376, Ex.
23 1, p. 21).

24 Perhaps Mr. Kelly Smith is more representative of a victim. Between April 2010 and July
25 2011 he made 43 deposits into one of the bank accounts, for a total of about \$44 thousand. In his
26 victim statement, he states that he lost "over \$100,000" because he believed Connie Fenton. He quit
27 his job and didn't work for three years, because he expected this imaginary ship to dock any day.
28 It seems Connie Fenton, a retired school teacher, was quite a natural born swindler.

1 Two other examples of a different sort of victim are presented in Ely Ades and Edith Hatzig.
2 Each seemed to admit to themselves that they had fallen for a very bad line. Ely Ades, for his part,
3 took the logical step of suing Cecrle and getting a money judgment. Ms. Hatzig, judging from her
4 victim impact statement, seemed content to chalk up the experience to a bad business decision where
5 the cost of the lesson was \$23,565.

6 III.

7 Tom Cecrle.

8 He started life out with all the blessing of a white middle class life in Orange County
9 California. Although an average student, Tom Cecrle was big and strong and sports came naturally
10 to him. Life seemed to be rolling out in front of him quite easily. He even received a coveted
11 scholarship to play football for Cal. State Long Beach. Maybe if his knee hadn't gotten shattered,
12 things would have been different, but he lost the scholarship and soon left school.

13 One thing that Tom always seemed to have in abundance, was the gift of gab. He could talk
14 to anyone, and he was a good listener. This ability served him well in his eventual occupation of real
15 estate development. Beginning in 1986 and through 1998, Tom helped his company, B.H. Miller
16 Contractors play a pivotal role in the development of the business area around the McCarran
17 International Airport. Once again, things might have been different if Las Vegas hadn't gotten to
18 him as it has so many others. Tom discovered that he loved to gamble- to much, and habitual
19 gamblers *have to lie*.

20 That was Tom Cecrle's real talent. He could make himself believe something to the point
21 where it didn't matter if the thing were true or not. He was just as sincere and persuasive when
22 talking about it as if he was talking about the sky being blue.

23 So at this point in his life, with his sentencing hearing looming, to learn of the complete the
24 domestication of Mr. Cecrle might seem quite shocking. He always professed a great love of his
25 family and especially his four daughters, but was really not actively engaged in their lives due to his
26 instability. Then, with his arrest in this case, those relationships changed dramatically. Instead of
27 being emotionally committed but physically distant, Tom Cecrle went "all in" with his family.

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1 Two grandchildren were born while Tom was in pretrial detention. His mother, who had
2 begun to degenerate as a consequence of Alzheimers, lost her ability to live independently and was
3 thrust into various temporary living arrangements with relatives. Tom's brother Rick moved to Las
4 Vegas with his family to led support to his brother and care for his mother, but that arrangement
5 disintegrated under the pressure placed upon the blended families.

6 Today, Tom Cecrle finds himself in the sole role of care giver to his mother Mary, his
7 daughters Hanna and Cayla, and soon to be, of his brother Rick. Rick had gone with his wife and
8 children to Texas to search for a better job and to be closer to his wife's family. Recently diagnosed
9 with bone cancer, Rick has separated from his wife and needs to come back to live with Tom while
10 he begins chemotherapy treatments. Hanna is Tom's youngest daughter and to understand their
11 relationship now, you need to know a little more about Tom's relationship with her mother.

12 Tom met Misty Menchaka about 15 years ago. Hanna was born about two years later. As
13 time went on, Tom could see that Misty was starting to act a little differently in that she was jumpy
14 and forgetful. One day he came home early and found Misty in the midst of ingesting some Meth.
15 Tom was more upset however, over the fact that Misty was keeping her drug use a secret from him.
16 His solution was to insist that she never do it in front of the children, and if she was going to do it,
17 they should do it together. So began Tom's own period of addiction to methamphetamine.

18 Tom and Misty's shared physical custody of Hanna was interrupted only by his period of
19 incarceration. Hanna was living with Tom when his condo was searched and he was arrested. After
20 his release she stayed with Tom from time to time. Now, she lives with him full time.

21 Tom discovered that Hanna was simply walking away from school when Misty dropped her
22 off there in the mornings. Misty couldn't deal with all that was going on with Hanna, and so she just
23 turned Hanna over to Tom and told him to deal with it. He did. The first thing Tom did was
24 schedule a conference with the school. He got Hanna, formerly an excellent student, to come back
25 to school, with an agreement that they follow up with a counselor. When they went to the counselor,
26 Hanna wanted her father there with her during the sessions- now numbering about one per week.
27 Tom's support for his daughter cannot be replaced.

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1 Cayla is even more fragile than Hanna. She developed a drug problem around the time that
 2 Tom was put in jail. She quit oxycodone when she was pregnant with her daughter Priscilla, and has
 3 since supported herself as a cocktail waitress. She stepped in to help obtain a residence for Tom and
 4 her grandmother when the arrangements with Rick's family ended. Then, she met another man and
 5 she resumed using drugs.

6 Tom discovered this recently when he found Cayla in the midst of a seizure. After being
 7 taken to the hospital, Tom found out that she was dealing with a high risk pregnancy and that her
 8 body was suffering from a lack of sugar. Cayla stayed in the hospital for five days and her addiction
 9 was revealed there. In the days that followed, Tom learned that the father of the unborn child was
 10 physically abusive and an enabler of the addictive cycle.

11 Hanna and Cayla will continue to stay with their father as long as possible. A big factor in
 12 their problems, and now ironically, of their recovery, is finding a way to deal with their father being
 13 gone. As for Mary, she now spends much of her days with Nellie Rae Jones, talking to her, helping
 14 out with her personal needs, and basically sharing what comfort the ladies can lend each other. Rick
 15 needs his brother's support like he never has in his life.

16 IV.

17 The Impact of the Guideline Recommendation.

18 It is not often, and rarer still, for a Defendant to agree with the prosecutor's position. On this
 19 point however, agreement is wholehearted. It is error for a court to attach a presumption of
 20 reasonableness to the Guidelines range, or weigh the Guidelines more heavily than any other factor.
 21 *United States v. Carty*, 520 F.3d 984, 994 (9th Cir. 2008). Consequently there is no special deference
 22 due the guideline recommended in the PSR, or even the one agreed to by the Parties. Weighing all
 23 of the factors, requires the Court to make an individual assessment of Mr. Cecrle and a determination
 24 that the eventual sentence is no greater than necessary to meet the ends of justice.

25 *See: Kimbrough v. United States*, 128 S.Ct. 558, 564 (2007).

26 A. Do these guidelines even comport with the statutory objectives of sentencing?

27 In *Rita v. United States*, 127 S.Ct. 2456 (2007), the Court indulged in some reflection about
 28 the goals of sentencing and sentencing standards advocated in the Guidelines. *Id.*, at 2473. Justice

1 Ginsburg pointed out how things such as age, education, mental or emotional condition, and family
2 ties, are not considered. She went on to say that because of that guidelines might only be a rough
3 approximation of sentences that might be reached according to the objectives of 18 U.S.C. §3553(a).
4 *Id.*, at 2465. It is certainly true that as a result of that debate, a District Court is non longer bound
5 by standards governing Guideline departure, but is free to employ its discretion regarding variances
6 for such things as health and family concerns. *C.f. United States v. Menyweather*, 431 F.3d 692 (9th
7 Cir. 2005) (eight level variance upheld in embezzlement of \$500,000 in light of broader, post-*Booker*
8 discretion to weight multitude of factors previously deemed “not ordinarily relevant.”).

9 1. Criminal History does not take into account the lack of risk that Cецrle will commit other
10 crimes and is otherwise overstated.

11 Tom Cецrle is classified in Criminal History III. In order to assemble the necessary six points
12 for that designation, the PSR had to begin with a driving under the influence case that was
13 committed in 1993. (PSR, p. 13 at 57). Even so, the case had to have been kept open through 2006
14 because Cецrle could not focus on satisfying the punishment. The next two points came about in
15 2006 when Tom pled guilty to possession of his methamphetamine the first time. (PSR, p. 14 at 61).
16 The next point was the result again of Cецrle’s drug addiction. (PSR, p. 15 at 62). It took place the
17 year following the incident at the casino.

18 All of these are relatively minor offenses compared with those of other offenders who are
19 classified in Category III. The same is true of the 2008 conviction for traffic offenses. The synopsis
20 provided in the PSR for that case is also illustrative. Tom was booked into jail, not so much for the
21 offense, but just as in the previous encounters, he had warrants for other minor offenses due to his
22 drug use. (PSR, p. 16 at 64). The same thing occurred again in the instance that provides the sixth
23 and final point of the calculation. As a result of his past minor offenses, Tom was searched and
24 another drug charge was brought. (PSR, p. 17 at 66).

25 Tom Cецrle has no felony convictions. It is appropriate for this Court to consider that Tom
26 has no crimes of violence as might be the case with other offenders in Category III. Perhaps more
27 importantly however, is that since his release from pretrial detention, Tom has remained completely
28 drug free and has assumed the mantle of care giver and contributor to others’ welfare.

1 2. Effect of imprisonment.

2 At 50, Tom Ceele is already considered a senior citizen by Bureau of Prison standards. The
3 Bureau itself has recognized that at this age, the normal functioning in a custodial setting is more
4 difficult. Long lines for food or processing are a norm of prison life. Maneuvering between upper
5 and lower bunks is harder. Tom also goes in with a history of arthritis and high blood pressure. *C.f.*
6 *United States v. McFarlin*, 535 F.3d 808 (8th Cir. 2008) (three year term of probation for drug offense
7 conspiracy where 54 year old's health problems and extraordinary post-arrest rehabilitation are
8 considered).

9 Although the author of this memorandum typically shuns the urge to use string citations, it
10 seems the most effective way to illustrate the depth of authority that would urge this Court to
11 seriously consider the extraordinary family circumstances here where a prolonged period of
12 incarceration would have a harsh effect on innocent family members. The case of *United States v.*
13 *Menyweather, supra.*, has already been cited for consideration on other grounds. In that case our
14 Circuit Court endorsed a departure of 8 levels because that defendant cared for his daughter, and this
15 was considered an unusual situation as a single parent. In another case, the Court of Appeals upheld
16 departure for a defendant who was the sole care giver of a suicidal wife who suffered from renal
17 failure. *United States v. Leon*, 341 F.3d 928 (9th Cir. 2003).

18 Other Circuits have reached similar decisions. *See: United States v. Antonakopoulos*, 399
19 F.3d 68 (1st Cir. 2005) (on remand in a bank fraud case, the court was instructed to consider the
20 defendant's role as caretaker for brain-damaged son even though alternative means of care existed.).
21 Also, *United States v. Dominguez*, 296 F.3d 192 (3rd Cir. 2002) (sentencing court could depart four
22 levels in bank fraud case where the defendant resided with elderly parents, who were physically and
23 financially dependant on her.). Finally, *see United States v. Owen*, 145 F.3d 923 (7th Cir. 1998) (49
24 month downward adjustment for a defendant that maintained a good relationship with his children
25 and the sentencing court believed his active role raising and supporting his family was atypical for
26 a crack dealer, and lengthy imprisonment may have forced his wife on public-assistance, and finally,
27 defendant spent time with is brother who was disabled.).

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1 3. Post Arrest Rehabilitation.

2 For a decade or more, Tom Cecnle supported himself and his addictions by lying to everyone
3 around him. He has largely conquered those addictions. Whether it was the drugs that triggered his
4 gambling, or the other way around, since he no longer uses drugs he has been forced to confront his
5 better self. The Supreme Court considered such post offense conduct in *Gall v. United States*, 128
6 S. Ct. 586 at 593 & 599 (2007). In doing so it was stated in part as follows:

7 It has been uniform and constant in the federal judicial tradition for the sentencing
8 judge to consider every convicted person as an individual and every case as a unique
9 study in the human failings that sometimes mitigate, sometimes magnify, the crime
and the punishment to ensue.

10 *Id.*, at 598. *See also, United States v. Green*, 152 F.3d 1202 (9th Cir. 1998).

11 B. Impact of the Loss Table.

12 Although the restitution has been agreed to and discussed, the loss amount is a significant
13 factor in that, according to the calculations under the advisory guideline, it adds 19 levels to this
14 fraud case. For its part, the Commission has never explained the reasoning behind any of its specific
15 offense characteristics, including the demarcations for amounts. Another question that remains
16 unanswered as a result, is why the Guidelines identify amount over other factors, and in doing so has
17 weighted loss in the way it has.

18 One obvious flaw in the loss schedule, has even been recognized by the Commission. The
19 Sentencing Commission has released its preliminary proposed amendments to the Guidelines which
20 indicate the intention to revise the loss tables to account for inflation. The proposal offers two
21 possible options for future revisions, both of which increase the loss amount necessary to trigger the
22 corresponding loss enhancement. For example, under a proposed amendment to U.S.S.G. § 2B1.1,
23 the loss amount necessary to trigger an 18-level enhancement for loss is increases from \$2,500,000
24 to \$3,000,000.00. This Court is empowered to consider the Commission's anticipated, and long
25 overdue, changes to the amounts necessary to trigger enhancements as further grounds to support a
26 downward variance, regardless of the loss amount ultimately calculated in this case.

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CONCLUSION

After consideration of the foregoing arguments, factual points and legal authorities, it is respectfully suggested that this Court engaged in deliberations for the upcoming sentencing of Tom Cecrle, that gives equal weight to all the factors that need to be considered. In doing so, the Court will undoubtedly consider whether 78 months or 120 months is warranted, but also it is expected that the Court will consider those factors that take this case out of the heartland of fraud cases and those that make this Defendant different than other fraud defendants. In light of lighter sentences being imposed on co-defendants, it is fully expected that at sentencing Mr. Cecrle will ask for a fair and just sentence that is substantially lower than the lowest recommendation.

DATED this 25th day of February, 2015.

Respectfully Submitted,

RENE L. VALLADARES
Federal Public Defender

/s/ William Carrico

By _____
William Carrico,
Assistant Federal Public Defender

CERTIFICATE OF ELECTRONIC SERVICE

The undersigned hereby certifies that she is an employee of the Federal Public Defender for the District of Nevada and is a person of such age and discretion as to be competent to serve papers.

That on February 25, 2015, she served a copy of the above and foregoing **SENTENCING MEMORANDUM OF DEFENDANT THOMAS CECRLE**, by electronic service (ECF) to the person named below:

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